

– The Chairman –

To the EFMLG members

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Dear colleagues,

Draft Common Frame of Reference (DCFR) – Principles, Definitions and Model Rules of European Private Law (Item 4, EFMLG meeting of 11 June 2008)

At our last meeting on 31 March 2008 in Athens we could not deal for reasons of time with our last item of the agenda, referred to the Draft Common Frame of Reference (DCFR) on the Principles, Definitions and Model Rules of European Private Law.

This document of 400 pages was communicated to the European Commission in December 2007 and the full and final version of the DCFR is to be submitted to the European Commission at the end of December 2008¹. The DCFR provides that ‘any contributions to the discussion should be made as soon as possible’ since ‘the editorial deadline for the full edition will be the end of September 2008’².

Let me make a short outline of its origin and context.

Although the ambition to harmonise European contract law may be traced back to the last quarter of last century, where private law academics of several countries started to meet under the leadership of Professor Ole Lando to prepare what resulted in the “Principles of European Contract Law” (whose first two volumes out of a total of some 11 volumes planned were published in 1999), the DCFR project has a more recent and specific background.

¹ See paragraph 79 of the DCFR (‘General Part’), January 2008, p.39.

² See paragraph 3 of the DCFR (‘General Part’), p.5.

On **January 2003**, the European Commission, at the instance of the European Parliament, adopted an “*Action Plan on European Contract Law*”³, where the idea to develop a “Common Frame of Reference” (CFR) was launched, with the idea of achieving future consistency in EU legal acts when addressing contracts, but also of facilitating convergence in national legislation on this contractual domain.

Following interaction with all stakeholders, on **October 2004** the European Commission adopted a document entitled “*European Contract Law and the revision of the acquis: the way forward*”⁴. The idea of the CFR was adopted, with the aim of (i) setting the fundamental principles, definitions and model rules for Contract Law, (ii) reviewing the existing acquis containing Contract Law provisions, so as to make them consistent with the CFR, (iii) creating a what was termed “Tool Box” for national legislators to converge, and (iv) setting the basis for a possible, although still remote, optional instrument for private parties when having to decide on a governing law for their multinational contracts.

On **February 2007** the EC adopted a “*Green Paper*” on the “*Review of the Consumer acquis*”⁵, a project to (i) ensure consistency in the 8 identified EU Directives dealing with consumer contracts, and (ii) expand the scope of the existing directives so as to encompass Insurance contracts and Security over assets.

On **18 April 2008**, the Justice and Home Affairs Council endorsed a report setting up a Common Frame of Reference for European Contract Law (CFR)⁶. That report defines the Council's position on four fundamental aspects of the CFR:

- (a) Purpose of the CFR: a tool for better lawmaking targeted at Community lawmakers;
- (b) Content of the CFR: a set of definitions, general principles and model rules in the field of contract law to be derived from a variety of sources;
- (c) Scope of the CFR: general contract law including consumer contract law;
- (d) Legal effect of the CFR: a set of non-binding guidelines to be used by lawmakers at Community level on a voluntary basis as a common source of inspiration or reference in the lawmaking process. The Council indicated that the above report will be

³ COM(2003) 68 final.

⁴ COM(2004) 651 final.

⁵ COM(2006) 744 final.

⁶ 2863rd Council meeting Justice and Home Affairs, 18 April 2008 (http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/99991.pdf).

communicated to the Commission so that it can take due account of it in its future work on the CFR, i.e. the preparations of the Commission's White Paper on the matter⁷.

Four groups have been active on the DCFR project:

- The Study Group on European Contract Law, consisting of academics and practitioners from all EU member states (the former Commission on European Contract Law chaired by Prof. Lando).
- The Research Group on Existing EU Private Law, named "The Acquis Group".
- The Project Group on European Insurance Contract Law ("The Insurance Group").
- And the Compilation and Redaction Team, composed of 15 academics, who have drafted the DCFR based on the work of the other three groups.

Altogether, some 300 academics, practitioners and civil servants are involved in this project, which is an example of private-public partnership since both public money and private resources have financed the activities of such group (e.g. the European Commission, the Onassis Foundation, the Calouste Gulbenkian Foundation, the Austrian Fund for the Promotion of Research, etc.)

The DCFR contains 7 Books, with the following titles:

Book I: General Provisions;

Book II: Contracts and other legal acts (9 chapters);

Book III: Obligations and corresponding rights (7 chapters);

Book IV: Specific contracts (37 chapters);

Book V: Benevolent intervention in another's affairs (3 chapters) (our old notion of "Quasi contracts");

Book VI: Non-contractual liability (7 chapters);

Book VII: Unjust enrichment (7 chapters).

In addition, two annexes:

Annex 1: Definitions;

Annex 2: Computation of time.

The EFMLG was duly informed in 2004 of the European Commission project, and we offered at the time to the European Commission being legal advisers in what might

⁷ See the European Parliament resolution of 12 December 2007 on European Contract Law (www.europarl.europa.eu). See also the Commission Second Progress Report on the Common Frame of Reference, COM(2007) 447 final (http://ec.europa.eu/consumers/rights/cons_acquis_en.htm).

refer to financial markets. The European Commission has not requested any advice from us so far. However and in view of the above deadline of September 2008, the question I wanted to raise in our Athens meeting was whether the EFMLG should organise itself so as to be able to contribute to this project by commenting the DCFR in the areas more specific to financial services, or whether this being an overwhelming project the EFMLG should await being consulted, if ever. Pro-activity or re-activity.

In favour of taking a pro-active stance and devote some work to contributing is what I see as being a historical project, a window of opportunity for the EFMLG to be associated in our specific field of competence, and a piece in our group's objective of fostering EU financial integration. Possible topics for the EFMLG might be: Plurality of Creditors and of Debtors; Netting and Set-off; Loan contracts; Force majeure; Computation of time; Statute of limitations; Security contracts (i.e. pledge, mortgage); agency and mandate; etc.

Reasons against are rather practical ones: short timing for the complexity and difficulty of the project, and the need to organise a Task Force to start without delay in preparing a EFMLG contribution for finalisation in September.

At our EFMLG meeting in New York on 11 June, I would kindly ask you to come with (i) having perused the DCFR, (ii) your stance regarding whether the EFMLG should take a pro-active or a re-active attitude, and (iii) if the pro-activity approach is decided, whether yourself or a qualified lawyer of your institution could participate in the necessary Task Force.

With kind regards

[signed]

Antonio Sáinz de Vicuña